

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>TAMMY BRAZZLE</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,004,690
<b>RUSSELL STOVER CANDIES</b>	)	
Respondent	)	
AND	)	
	)	
<b>SENTRY INSURANCE A MUTUAL COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant requested review of the Post Award Medical Award entered on May 13, 2004 by Administrative Law Judge (ALJ) Bryce D. Benedict. The Appeals Board (Board) placed this case on its summary calendar for determination without oral argument.

**APPEARANCES**

Jeffrey K. Cooper of Topeka, Kansas, appeared for claimant. Brenden W. Webb of Overland Park, Kansas, appeared for respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The record considered by the Board consists of the documents contained in the administrative file of the Division of Workers' Compensation including the transcript of the post award hearing held on February 12, 2004 and the Stipulation for the admission of medical records filed April 13, 2004.

**ISSUES**

Claimant filed an Application for Post Award Medical on December 24, 2003. The nature of medical care sought was stated as "[c]hange of physician."<sup>1</sup> On May 13, 2004, the ALJ entered an order denying claimant's request for additional medical treatment.

The [c]ourt is persuaded by the opinions of Dr. Hylton and Dr. Hendler that the [c]laimant is at maximum medical improvement and not in need of further treatment. Dr. Hylton noted the [c]laimant's symptoms are far out of proportion to any objective findings. Dr. Hendler determined that considering the [c]laimant's symptoms have without cause become more generalized, and she exhibits inconsistent responses, any further treatment is unlikely to provide any benefit with the exception of psychological treatment alone for pain management. Dr. Hendler had recommended the [c]laimant wean herself off of Oxycontin, but instead she went to her personal physician to obtain this medication and Lortabs. His office note of November 13, 2003 noted the [c]laimant made the bizarre report that after taking only one Gabitril she was completely paralyzed from the waist down until the following morning.

Regarding the [c]laimant's request for mileage to her personal physician and for payment of narcotics prescribed by him, the [c]ourt finds this was unauthorized treatment and the [r]espondent did not neglect its duty to provide treatment. Therefore[,] the request for payment of mileage and for prescription reimbursement is denied.

Claimant contends the ALJ erred in finding claimant has reached maximum medical improvement and is not in need of additional treatment. In addition, claimant argues:

[T]he ALJ erred by denying [c]laimant's request for payment of mileage and prescription reimbursement, determining that [r]espondent had not neglected its duty to provide treatment and that the treatment subsequently received was unauthorized. Claimant contends that the ALJ disregarded the appropriate medical records and evidence in making his determination. Claimant asserts that she is entitled to additional medical treatment to assist her with pain management. Further, the treatments at issue, which [c]laimant has previously received, should be considered authorized and she must be reimbursed for both mileage and prescription costs."<sup>2</sup>

Conversely, respondent asks the Board to affirm the ALJ's Award.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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<sup>1</sup> Application for Post Award Medical (filed Dec. 24, 2003).

<sup>2</sup> Claimant/Appellant's Brief to The Workers Compensation Appeals Board at 1 (filed June 29, 2004).

It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.<sup>3</sup>

This claim was settled at a hearing before Special Administrative Law Judge (SALJ) Michael J. Unrein on April 1, 2003. At that settlement hearing claimant gave up her right to review and modification but the right to future medical was left open. Claimant received a lump sum award which approximated a 49.7 percent work disability.

The Form 12 Work Sheet for Settlements attached to the settlement hearing transcript showed that claimant was injured on May 8, 2002 in Abilene, Dickinson County, Kansas. The only medical evidence presented in support of the settlement was an October 28, 2002 status report by C. Edward Wilson, M.D., of North Kansas City, Missouri. At that time claimant was complaining of persistent thoracic and left-sided chest wall discomfort. She reported that she had discussed the option of surgery with Glenn Amundson, M.D., and decided against proceeding with that treatment modality. Due to her persistent thoracic radiculopathy Dr. Wilson increased his previous five (5) percent functional impairment rating to a seven (7) percent permanent partial impairment for the body as a whole. He recommended a trial of Neurontin and continuance of her OxyContin and Celebrex medications. "These medications constitute the anticipated future medical needs of Mrs. Brazzle. I have recommended a final second opinion with pain management for discussion of medial branch ablation and/or additional modalities of care. She is to be seen back in this office on a p.r.n. basis."<sup>4</sup>

On July 22, 2003, Judge Benedict entered a Post Award Medical Award which provided: "[t]he claimant's request for massage therapy as prescribed by Dr. Peloquin is granted. The TENS unit prescribed by Dr. Peloquin and the supplies for this are authorized. Other than these two matters specifically authorized by the [c]ourt the right to control the course of medical treatment remains with the [r]espondent."<sup>5</sup>

Thereafter, on October 21, 2003, Judge Benedict entered an Order as follows:

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<sup>3</sup> K.S.A. 44-510h(a).

<sup>4</sup> S.H. Trans. attachment Work Sheet for Settlements 10/28/02 Status (filed April 8, 2003).

<sup>5</sup> AWARD Post Award Medical (July 22, 2003).

The request to modify the treatment being provided is denied. The [c]laimant has not demonstrated that the office visits to Lawrence will be so frequent as to constitute a reasonable inconvenience, especially as the [r]espondent will provide transportation to Lawrence, and the physical therapy will be provided locally.

The issue regarding payments for mileage, prescription reimbursement and the visit to Dr. Ditto are continued to the next hearing.<sup>6</sup>

At the February 12, 2004 post award hearing before Judge Benedict, counsel for claimant informed the court that respondent had authorized Dr. Hendler to treat claimant but "he has now discharged her and is not providing any treatment. So, there is no authorized physician at the present time."<sup>7</sup> Claimant requested Dr. Peloquin be authorized to provide her medical treatment.

Claimant testified that she was continuing to reside in Abilene, Kansas. She was working at the Holiday Inn Express in Abilene as a front desk clerk. By way of history, she stated that Dr. Wilson had been her authorized treating physician. When she last saw him he had her on pain medication and, as a result of his recommendation for pain management care, she saw Dr. Peloquin in Manhattan, Kansas. He gave her a series of epidural shots and continued her on OxyContin. Claimant said those injections provided her temporary relief that lasted approximately four to six months. The insurance carrier subsequently de-authorized Dr. Peloquin and transferred claimant's care to Dr. Hendler in Shawnee Mission, Kansas. Dr. Hendler continued her on OxyContin but said she needed to wean herself off that medication. He also prescribed physical therapy which claimant received in Salina, Kansas. About this time in the fall of 2001 claimant started having difficulty reaching Dr. Hendler and getting her pain medication prescriptions. As a result, she contacted her family physician, Dr. Ditto, who gave her a prescription for OxyContin. Claimant returned to Dr. Hendler on November 20, 2003, and at that time she was advised that he was not going to provide her any further treatment.<sup>8</sup>

Since then claimant has been obtaining treatment on her own from her personal physician Dane E. Ditto, M.D., his associate, Mikki Minocha, M.D., and from Howard A. Aks, M.D., who claimant saw at her attorney's request. She is currently taking Lortab, Soma and Carisoprodol for pain in her neck and back.<sup>9</sup> She denies any new injuries and describes her symptoms as a continuation of the pain from her work-related injury. Prolonged standing causes her problems and as well as driving or being in a car for a long distance. She has to stop every 15 minutes and get out of the car because of pain,

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<sup>6</sup> Order (Oct. 21, 2003).

<sup>7</sup> P.A. H. Trans. at 3.

<sup>8</sup> P.A. H. Trans. at 19 and 20.

<sup>9</sup> *Id.* at 22 and 23.

stiffness and burning in her neck and shoulders. Because of this, she would prefer a physician closer to her home.

The parties did not obtain the deposition testimony of the numerous treating and examining physicians. Instead, the pertinent medical records and reports were introduced by stipulation. Those include records from Dr. Howard Aks, Salina Regional Health Center, Dr. Phillip Hylton, Dr. Dane E. Ditto, Dr. Steven Hendler, Dr. Steven R. Peloquin, Dr. Glenn Amundson, Mercy Health Center, Dr. C. Edward Wilson, Occupational Health Clinic, Geary Community Hospital and Abilene Memorial Hospital.

Dane E. Ditto, M.D., is an internal medicine physician in Manhattan, Kansas. He has been claimant's family physician since July 1996. He was not involved in her prior treatment for her work-related injury until October 30, 2003. In a letter to Dr. Hendler he wrote:

At that time I assisted her with her narcotic withdrawal. I find Tammy to be consistently honest and to have appropriate goals for her care. . . I do not find issues of secondary gain. She has received benefit from deep tissue work through PT and [m]assage [t]herapy. She had been recommended trigger point injections by a local anesthesiologist whom I commonly utilize for difficult chronic pain problems. She expressed that she would discuss these possibilities with you.<sup>10</sup>

On August 11, 2003, Dr. Ditto wrote a letter regarding the medical necessity for travel restrictions.

Tammy is currently in my medical care. She suffers from thoracic strain and disc herniation causing chronic pain. This pain is exacerbated by travel in a motor vehicle. She is currently required to travel from her home in Abilene to receive medical care in Lawrence. This essentially puts her driving time at four hours. Therefore, her husband is taking leave from his work to drive her to appointments. Ultimately, Tammy's medical condition is being exacerbated, and this requirement is an undue burden.

I request that she discontinue her medical care in Lawrence in favor of similar care that can be obtained closer to her home. Please give her your utmost consideration.<sup>11</sup>

Steven L. Hendler, M.D., of College Rehab. Medicine in Shawnee Mission, Kansas, was claimant's last authorized treating physician. He last examined claimant on November 20, 2003. At that time, claimant gave the following history:

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<sup>10</sup> Stipulation (filed April 13, 2004) Dane E. Ditto, M.D., Letter dated Nov. 12, 2003 to Mr. Hendler.

<sup>11</sup> Stipulation (filed April 13, 2004) Dane E. Ditto, M.D., Letter dated Aug. 11, 2003.

Ms. Brazzle returns today for follow up. The patient is a 39 year old right handed female who gives the following interval history:

She reports she is feeling bad with arm numbness and back pain. There is now numbness in both arms with pain in the back which is unchanged. She could not tolerate the Gabitril and the Darvocet didn't agree with her. She went to her family doctor and got Hydrocodone. She states she became paralyzed within half hour of taking the Gabitril and was essentially unable to move for hours after taking the medication.

She is not tolerating the therapy at all. I spoke with the therapist about her therapy and he feels there is magnification with inconsistent responses. He indicates that in one of the exercise[s] she was positioned with straight leg raise of about 80 degrees without symptoms but was unable to tolerate "testing" into that same position.<sup>12</sup>

Dr. Hendler's impression was "[t]horacic strain" and "[p]ain disorder," organic and non-organic bases.<sup>13</sup> Dr. Hendler then concluded:

Based on her current response to treatment, I am going to discontinue treatment. She has had increase in the generalization of her symptoms with continued inconsistent responses. Based on these findings I don't think further therapy or injection management would be likely to be helpful. She inquires about seeing a chronic pain specialist and I've reviewed with her that the only reasonable approach would be possible psychological intervention for pain management. Her (and her husband's) very strong objection to any role for psychology in managing her pain indicates she is unlikely to benefit from this approach either.

No further follow up at this time. She declined any additional medication. As such, there is no additional recommended treatment for Ms. Brazzle.<sup>14</sup>

Howard A. Aks, M.D., performed an independent medical evaluation of claimant on December 17, 2003 at the request of her attorney. Dr. Aks is with the pain management department at Menorah Medical Center in Overland Park, Kansas. Dr. Aks diagnosed claimant as having:

1. Chronic intractable pain secondary to reported injury on 05/08/03.
2. Midthoracic spine pain secondary to spinal pathology, more than likely diskogenic in origin.
3. Thoracic radicular pain per history.

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<sup>12</sup> Stipulation (filed April 13, 2004) Steven L. Hendler, M.D., Report Nov. 20, 2003.

<sup>13</sup> *Id.* at 2.

<sup>14</sup> *Id.* at 2.

4. Possible thoracic facet syndrome.
5. Pain, numbness, and tingling in the right upper extremity. Etiology undetermined at this time. Possible cervical radicular pain.
6. Myofascial pain involving the trapezius muscle of the shoulder girdle as well as the paraspinal muscles.
7. Lower back pain, etiology undetermined.
8. Borderline asthma.
9. Tobacco use.<sup>15</sup>

Dr. Aks made several recommendations for treatment including that she return:

[T]o the pain specialist that she saw, Dr. Peloquin, and to undergo diagnostic thoracic facet blocks to determine to what degree this thoracic spine pain is due to a thoracic facet syndrome. I do agree with Dr. Peloquin's assessment and I do think that the patient might have a component, possibly significant component of thoracic facet syndrome. If the patient receives benefit on a temporary basis from the diagnostic thoracic blocks, then possible consideration towards radiofrequency ablation might be considered.<sup>16</sup>

He also recommended that she quit smoking and start stretching exercises on a daily basis. In the event it turns out that claimant's thoracic spine pain is not due to facet syndrome, Dr. Aks said:

I do agree with Dr. Glenn Admundson that provocative diskography to isolate the symptomatic disk would then be appropriate. A new MRI scan possibly would be appropriate as well. I would not recommend any of these measures unless she is willing to go the next step and that is to have surgery. . . [i]n regards to her lower back pain, I am not in receipt of an MRI scan of the lumbosacral spine. I would think that if this has not been done, certainly it should be to help further delineate pathophysiology of this lower back pain.

If the MRI scan shows some pathology, then I would imagine Dr. Peloquin is certainly capable of recommending treatments. I would certainly not recommend performing any more than 2 epidural injections in the lower back unless she sees significant benefit in regards to her lower back pain.

In regards to her right upper extremity pain, the etiology at this time is undetermined. I would recommend at this time to go ahead and proceed with an EMG to try to further delineate the pathophysiology of this right upper extremity pain and numbness. If it appears that she has a cervical radicular presentation and

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<sup>15</sup> Stipulation (filed April 13, 2004) attachment of Dr. Howard Aks Final Report (filed Dec. 24, 2003) at 3 and 4.

<sup>16</sup> *Id.* at 4.

possibly an epidural injection in the neck would be appropriate and can be done under fluoroscopic guidance.

In conclusion, I do feel that the patient's situation has not been thoroughly worked up, and she certainly is not at maximum medical improvement.<sup>17</sup>

Claimant was thereafter seen at the request of the insurance carrier by Phillip D. Hylton, M.D., of the Kansas City Neurosurgery Group. In his assessment of claimant on January 29, 2004, his impression was:

Rather diffuse structural complaints, which are certainly far out of proportion to any physical findings and do not correlate with any of her degenerative radiographic findings.

At this point I would agree with Dr. Wilson that the patient is at maximum medical improvement. I do not find that she would benefit from any further invasive or destructive/ablative treatments. I would suggest that if any evaluation is performed, an evaluation for symptom magnification would be beneficial, although I do not find that it would be likely to alter her symptom complaints. I would recommend that she needs to come to some closure to her treatment and settle her case.<sup>18</sup> I have not recommended any further evaluation through this office and do not believe that any other treatments are required.<sup>19</sup>

The Board finds the opinions of Drs. Aks, Ditto, Peloquin, Wilson and Admundson to be more credible and persuasive than the opinions of Drs. Hendler and Hylton. Accordingly, additional medical treatment is appropriate and should be awarded. In addition, claimant also requests reimbursement for the expense of certain prescriptions and mileage for travel to and from the pharmacy. These expenses were incurred during a period when respondent was failing to provide medical treatment or when the authorized treating physician was either unavailable or not responding to claimant's request for additional treatment. The Appeals Board finds the prescriptions were necessary to relieve claimant from the effects of her injury.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of May 13, 2004, entered by Administrative Law Judge Bryce D. Benedict shall be reversed and additional medical treatment is ordered.

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<sup>17</sup> *Id.* at 4 and 5.

<sup>18</sup> Apparently, Dr. Hylton was unaware that claimant had settled her claim including her right to review and modification of her disability award.

<sup>19</sup> Stipulation (filed April 13, 2004) attachment of Dr. Phillip Hylton's Independent Medical Exam (Jan. 29, 2004) at 2.



The respondent shall submit the names of three (3) local health care providers within a reasonable distance from claimant's residence pursuant to K.S.A. 44-510h(b). Respondent is further ordered to pay as authorized medical expenses the medical mileage and prescription expenses itemized in Claimant's Exhibit 1 to the February 12, 2004 transcript of post award hearing.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant  
Brenden W. Webb, Attorney for Respondent and Sentry Ins. Co. A Mutual Co.  
Bryce D. Benedict, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director